Office-Supreme Court, U.S.
FILED
FEB 17 1965
JOHN F. DAVIS, CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1964.

**No. 355**

BERNARD SUSSER, *et al.*,
*Petitioners.*

*vs.*

CARVEL CORPORATION, *et al.*,
*Respondents.*

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.*

## BRIEF FOR RESPONDENT, EAGLE CONE CORPORATION.

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## BRIEF FOR RESPONDENT, EAGLE CONE CORPORATION.

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### Statement.

The petitioners were plaintiffs in nine antitrust suits brought in the United States District Court for the Southern District of New York, wherein they sought treble damages against Carvel-defendants and supplier-defendants. Eagle Cone Corporation, one of the supplier-defendants, was named a defendant in six of said actions. Eagle sold to Carvel its total requirements of ice cream cones in the tri-state area of New York, Connecticut and Massachusetts. The complaint named Eagle as one of the conspir-

ators in the alleged violation of the antitrust laws. The District Court dismissed the complaint as against the supplier-defendants (206 F. Supp. 626). The Court of Appeals for the Second Circuit affirmed such dismissal. The dissenting opinion of Judge Lumbard was addressed only to the tie-in phase of the franchise agreement. The Court of Appeals was unanimous in its affirmance of the dismissal as against the supplier-defendants.

## Parties to the Law Suit.

During the course of the litigation, the plaintiffs discontinued their action as against a number of supplier-defendants. The actions against Burry Biscuit Corporation, Illinois Baking Corporation and Richardson Corporation were discontinued by stipulation. The first of the two said named defendants obviously manufactured baked goods for Carvel in the same manner as did Eagle. The appeal was discontinued as against Mohawk Container Company, Inc., a supplier of paper goods (R. 4-5).

The alleged reason for the dismissal as against Burry Biscuit Corporation will be discussed in this brief. The reason for dismissal as against the other said supplier-defendants is not known. The petitioners in their brief have discussed at length the illegality of the franchise system, particularly as it referred to the requirement that the dealers use paper products from designated sources. (Pet. Brief, pp. 21, 24, 36, 37, 64, 65). Accordingly, the petitioners should have provided a reason for having dropped Mohawk from the case.

## The Carvel-Eagle Supply Contract.

On or about May 1, 1955, Eagle entered into two sales contracts: one with Carvel Dari-Freeze Stores, Inc. (R. 124), and the other with Carvel Stores of New York, Inc. (Ex. 11, R. 264). Said contracts are virtually identical and provide the following:

1. Eagle agreed to manufacture and sell to Carvel all of Carvel's requirements of the cones described in said contract to be furnished to all Carvel stores in New York, Connecticut and Massachusetts (R. 125).

2. Eagle agreed to furnish the cones in the shape and design indicated on the attached drawing and to produce cones of said design only for Carvel and no other person (R. 125-126).

3. Eagle agreed to make delivery at its own cost to designated Carvel stores in accordance with instructions from Carvel in cartons imprinted with Carvel's name or trade mark (R. 126).

4. Eagle agreed to print Carvel invoice forms and to prepare invoices thereon addressed to the Carvel dealers; and to deliver same with each delivery of cones. Said invoices were to set forth the prices which Carvel charged to the Carvel dealers, namely: Small Type Cone—$4.95 per. thousand; Large Type Cone—$10.00 per thousand (R. 127).

5. Carvel agreed to pay Eagle $4.70 per thousand for the small type cone and $9.50 per thousand for the large type cone (R. 128). Payment was to be made by Carvel for the cones as delivered, on the first day of each month upon statement rendered (R. 129).

6. Carvel authorized Eagle to accept orders placed by any of the Carvel stores (R. 129).

7. The term of the agreement was for one year, and then to automatically continue from year to year

unless either party gave 90-day notice of intent to terminate (R. 129).

The two cones described in said contract were indicated on drawings attached thereto, namely Buddy Twinkle (R. 131) and Major (R. 133). The Buddy Twinkle went out of use shortly after the contract was signed and was replaced by the "No. 40 cake cup cone", which was sold to Carvel at $4.56 per 600 and listed in the invoices delivered with each shipment at $4.80 per 600 (R. 115-116). A photograph of the "No. 40 cake cup cone" appears on the reverse side of the Eagle price list (R. 383).

## The Issue Discussed in this Brief.

Eagle will not undertake to argue the legality of the Carvel franchise operation, except to point out that in three recent decisions the courts again recognized the function served by such business method in the total economy, and the advantageous use thereof by small business in its competition with big business (*Crawford Transport Company* v. *Chrysler Corporation,* (6th Circ.), 338 F. 2d 934; *U. S.* v. *Arnold, Schwinn & Co.,* (N. D. Illinois) 5 C. C. H. Trade Regulation Reporter 71329; *Brown Shoe Company, Inc.* v. *F. T. C.* (8th Cir.) 5 C. C. H. Trade Regulation Reporter 71312.

In the instant case, Judge Dawson viewed the franchise system as good for the economy because "it creates a class of independent businessmen; it provides the public with an opportunity to get a uniform product at numerous points of sale from small independent contractors, rather than from employees of a vast chain." (R. 49). The Court of Appeals, in the majority decision, viewed the Carvel trademark as one "whose growing repute was

intended to help the little band of Carvel dealers swim a bit faster than their numerous rivals up the highly competitive stream." (R. 452). The majority then made a finding of fact which should be determinative of the allegation of an illegal tie-in, as follows (R. 452):

> "There may, of course, be cases where a trademark has acquired such prominence that the coupling of some further item to its license would constitute a *per se* violation; but such a trade-mark would satisfy the market dominance test of Times Picayune and Northern Pacific. The figures show that Carvel is not such a mark."

Eagle will address itself to Question "4" of the questions presented by the petitioners (Pet. Brief, p. 3) namely: "Whether the agreements between Carvel and the supplier-respondents, whereby the latter are obliged to refrain from dealing with or selling to petitioners, violate the Sherman Act."

Eagle's position is that it did no more than sell to Carvel its requirements of ice cream cones. It did not conspire with Carvel, or with the other suppliers, to boycott the Carvel dealers, or to refuse to make direct sales to them of either the cones designated by Carvel or of any other Eagle product.

In this case, Eagle was not the distributor in the typical vertical alignment of distributor to dealers. It was a manufacturer who supplied Carvel, the distributor. Petitioners have alleged illegality in the supply contracts "whether considered as reflecting a horizontal understanding among distributors or a vertical one between manufacturer and distributor" (Pet. Brief, p. 53). Such classification of the parties by the petitioners can only confuse the basic picture.

The role played by Eagle will be better appreciated by reference to three decisions. In *Bascom Launder Corp.* v. *Telecoin Corp.* (2nd Circ.), 204 F. 2d 331, Cert. Den. 345 U. S. 994, Telecoin developed a franchise system in which it supplied Bendix washing machines to its dealers who operated laundry stores. Telecoin was the distributor; and Bendix, like Eagle, was the manufacturer who supplied the distributor. The Court of Appeals found no illegality in the Bendix-Telecoin supply contract.

In *U. S.* v. *Bausch & Lomb Optical Co.*, 45 F. S. 387, aff'd 321 U. S. 707, Soft-Lite Lens Co. Inc. developed a franchise system in which it sold pink lenses to numerous wholesalers. Bausch & Lomb entered into an agreement with Soft-Lite in which it undertook to manufacture the pink glass, to grind the lenses, and to refrain from competing with Soft-Lite in their sale. The Court found no illegality in such contract between manufacturer (Bausch & Lomb) and distributor (Soft-Lite).

An analagous situation appears in the recent case of *Crawford Transport Company* v. *Chrysler Corporation* (6th Circ.), 338 F. 2d 934. There Chrysler, as distributor, required its franchised dealers to utilize the services of carriers retained by Chrysler to transport new vehicles to the dealers. The Court found no conspiracy between Chrysler and the retained carriers.

In said decisions, as in the present case, the courts scrutinized the contractual relationship between supplier and distributor as a factor separate from the distribution system itself. In the instant case the petitioners joined the suppliers as co-conspirators and accused them of aiding and abetting Carvel in an unlawful franchise operation (Pet. Brief, p. 63); of participating in an "entente" among themselves to boycott the dealers (p. 51); and of combining

with Carvel to deprive the dealers of their freedom to buy in an open competitive market (p. 52). They contended that such illegal conduct by the suppliers was established *per se* by the very contracts they made with Carvel. In reliance upon the *per se* doctrine they failed to offer any proof as to the volume of commerce in the relevant market area, or the probable effect thereon of the Carvel supply contracts. Yet the authorities require such proof in judging the validity of a requirements contract. In reliance upon the alleged *per se* invalidity of the supply contracts, the petitioners failed to offer any proof of overt acts to sustain a conspiracy as between Carvel and the suppliers.

We shall undertake to demonstrate that the courts below committed no error in dismissing the case as against Eagle, first because there was a total failure of proof to sustain the allegation of a conspiracy to boycott; and second, because the Carvel-Eagle contract meets the test of reasonableness as a requirements contract.

## POINT I.

**The petitioners have failed to show that any of the findings of fact made by the courts below in respect of Eagle are "clearly erroneous".**

In *United States* v. *United States Gypsum Co.*, 333 U. S. 364, 394, the Court stated:

> "In so far as this finding and others to which we shall refer are inferences drawn from documents or undisputed facts, heretofore described or set out, Rule 52(a) of the Rules of Civil Procedure is applicable. That rule prescribes that findings of fact in actions tried without a jury 'shall not be set aside unless clearly erroneous' . . ."

* * * * * *

> "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed" (p. 395).

The appellants have the burden of demonstrating that erroneous legal tests were applied to essential findings, or that the findings themselves were clearly erroneous. It is not the function of the reviewing court to try the facts of the case *de novo.* The Supreme Court has stated that in antitrust cases the scope of review with respect to issues of fact is quite narrow (*Besser Mfg. Co.* v. *United States,* 343 U. S. 444, 446; *United States* v. *Oregon Medical Society,* 343 U. S. 326; *United States* v. *E. I. du Pont de Nemours & Co.,* 351 U. S. 377, 381). *In Crawford Transport Company* v. *Chrysler Corporation* (6th Circ.) 338 F. 2d 934, the Court stated (p. 940):

> "The evidence supports these findings of fact. Neither the findings of basic facts nor the inference drawn therefrom are clearly erroneous. This Court is bound to accept the factual inferences drawn by a trial judge from undisputed facts, unless they are clearly erroneous. Commissioner of Internal Revenue *v.* Duberstein, 363 U. S. 278, 291, 80 S. Ct. 1190, 4 L. Ed. 2d 1218; United States *v.* United States Gypsum Co., 333 U. S. 364, 395, 68 S. Ct. 525, 92 L. Ed. 746; Evans *v.* Commissioner, 330 F. 2d 518, 519, C. A. 6; In re Plonta, 311 F. 2d 47, C. A. 6".

At the outset of our argument, we submit that there has been no showing by the appellants to justify a reversal of any of the findings made by the courts below. As stated in *United States* v. *Yellow Cab Co.,* 338 U. S. 338, 340-341:

> "The judgment below is supported by an opinion, prepared with obvious care, which analyzes the evi-

> dence and shows the reason for the findings. To us it appears to represent the considered judgment of an able trial judge, after patient hearing, that the Government's evidence fell short of its allegations • • •"

## POINT II.

**Analysis of the Carvel-Eagle contract sustains the decisions of the courts below that Eagle was not part of a conspiracy to boycott the Carvel dealers or to unreasonably restrain competition.**

Carvel's relationship with the dealers is one issue of the case; Carvel's relationship with the suppliers is a second issue, separate and distinct. The two issues must be considered separately, not joined together. In the course of the trial, Judge Dawson stated (R. 109):

> "I'm not interested in your suit against Carvel in the general picture. I'm interested in the fact that you're claiming damages against Eagle Cone and I want to know what Eagle Cone has done which should subject them to damages."

Observe that Judge Dawson's decision first analyzed the relationship between Carvel and the suppliers ("IV. Liability of the Supplier Defendants," R. 51-53). Having concluded that there was no illegal conduct on the part of the supplier defendants, Judge Dawson then proceeded to analyze the relationship between Carvel and the dealers pursuant to the franchise agreement, and to give his consideration to the tie-in and exclusive dealing aspects thereof. The Court of Appeals gave virtually its entire consideration to the Carvel-dealer relationship and considered "The Supplier Contracts" as a separate issue in the final section of the Majority Opinion (R. 449). The determination of

legality as to the suppliers was unanimous; Judge Lumbard dissented only as to the tie-in feature of the franchise agreement.

The Petitioners' Brief has consciously joined the two issues, thereby producing confusion rather than clarity. Thus, in Petitioners' Point II which is addressed to the franchise system, they bring into the picture the extraneous issue of the all-requirements provisions in the Carvel supplier contracts (Petitioners' Brief, p. 30). In the same Point they also state: "It is also clear that Carvel, *as the supplier of such goods,* is competing with other suppliers" (pp. 33-34).

By such interweaving of the two separate issues, the appellants have drawn a number of unsupported inferences, as follows (Petitioners' Brief, p. 51):

> a) Carvel enjoys a monopoly not only by virtue of the franchise agreements, but as a result of the "concert of action of the suppliers".
>
> b) Between Carvel and the suppliers "there was either agreement or at least acquiescence in a program of concerted action".
>
> c) The Carvel "supplier entente constitutes a combination and conspiracy to boycott".

Petitioners then attempt to bolster up their unsupported conclusions of illegality by coupling them with inapposite decisions in which the Courts struck down illegal horizontal combinations whereby competing suppliers actually ganged up to deprive a retailer of a source of supply (Petitioners' Brief, p. 52). They have cited *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons, Inc.*, 340 U. S. 211, 71 S. Ct. 259, a case where competing manufacturers of liquor refused to sell to wholesalers. This Court held (p. 214):

> "Seagram and Calvert acting individually perhaps might have refused to deal with petitioner or with any and all of the Indiana wholesalers. But the Sherman Act makes it an offense for respondents to agree among themselves to stop selling to particular customers."

Petitioners have also cited *Standard Oil Company of California* v. *Moore,* 251 F. 2d 188, 211 (9 Circ.), Cert. Den. 356 U. S. 975, 78 S. Ct. 1139. In said case all the gasoline distributors in the area were charged with refusing to sell to a particular dealer, thereby forcing him out of business. In *Klors, Inc.* v. *Broadway Hale Stores, Inc.,* 359 U. S. 207, 79 S. Ct. 705, a similar boycott by competing suppliers of electrical appliances was conducted against a retailer who sold at discount. The Court stated (359 U. S. at p. 212):

> "Group boycotts, or concerted refusals by traders to deal with other traders, have long been held to be in the forbidden category. * * *
>
> "This is not a case of a single trader refusing to deal with another (citing cases); nor even a manufacturer and a dealer agreeing to an exclusive distributorship. Alleged in this complaint is a wide combination consisting of manufacturers, distributors and a retailer. This combination takes from Klors its freedom to buy appliances in an open competitive market and drives it out of business as a dealer in the defendants' products."

Despite the Petitioner's efforts to involve the supplier defendants as co-conspirators, the Court of Appeals was able to find in the Carvel-supplier contracts no evidence of an illegal boycott. Thus, (R. 449):

> "Carvel cannot be considered in competition with these suppliers from whom it purchases Carvel supplies, and such an agreement not to deal, even if

established, when effected by non-competing enterprises is not illegal. See, e.g., *Packard Motor Car Co.* v. *Webster Motor Car Co.*, 243 F. 2d 418 (D. C. Cir.), cert. denied, 355 U. S. 822 (1957). Moreover, the plaintiffs failed to prove that they were foreclosed from alternate sources of supply or indeed that the supplier defendants themselves had been requested to make sales to the dealers and had refused."

The District Court also held as follows (R. 51):

"The plaintiffs do not contend that the supplier defendants engaged in any common conspiracy with Carvel and with each other in furtherance of any illegal end. No evidence of any such conspiracy was offered; the plaintiffs relied on the agreements between Carvel and the supplier defendants to establish the unlawful conspiracies."

Upon examining said supplier contracts, the Trial Court held them legal as requirements contracts under the authority of *Tampa Electric Co.* v. *Nashville Coal Co.*, 365 U. S. 320 (1960); *United States* v. *Columbia Steel*, 334 U. S. 495 (1948); and *Bascom Launder Corp.* v. *Telecoin Corp.*, 204 F. 2d 331 (2nd Circ.), Cert. Den. 345 U. S. 994 (1953). It found further, as did the Court of Appeals, that the plaintiffs failed to prove that any of the supplier defendants were asked to make sales of unapproved merchandise and that they refused to do so. In respect of the allegation of a boycott not to sell, the District Court held (R. 53):

"Thirdly, even if the supplier defendants agreed with Carvel not to sell other than Carvel approved products to the franchise operators, such an agreement by two persons not in competition with each other would not have constituted an illegal boycott. Packard Motor Car Co. *v.* Webster Motor Car Co.,

243 F. 2d 418 (D. C. Cir.), Cert. Den. 355 U. S. 822 (1957); Schwing Motor Car Co. *v.* Hudson Sales Corp., 138 F. S. 899 (D. Md.) aff'd per curiam, 239 F. 2d 176 (4th Cir. 1956), Cert. Den., 355 U. S. 823 (1957)."

"Finally, the plaintiffs made no showing that they could not obtain non-Carvel merchandise from other suppliers or that the refusal of the supplier defendants to sell them such merchandise deprived the plaintiffs of any access to these goods."

**As to Petitioners' Contentions of Illegality in the Carvel-Eagle Contract:**

Despite the unanimous factual findings against them, the Petitioners still maintain in this Court that the Carvel-Eagle contract evidenced a participation by Eagle in an alleged conspiracy. The identical agreements which are now set forth in Petitioner's Brief were urged upon Judge Dawson, both in the course of Eagle's motion to dismiss the Complaint and in the final summation (R. 106-112). By referring to said arguments, this Court will appreciate the painstaking efforts made by the trial judge to scrutinize the Carvel-Eagle contract for possible illegality.

At page 47 of their Brief, Petitioners analyze the Carvel-Eagle contract. The Court should first observe two obvious, if not deliberate, distortions of fact. In the final paragraph of page 47, it is stated that it was the supplier's obligation to *collect* from each store. Such misstatement is repeated at page 16. Yet in paragraph numbered "8" on page 47, the Petitioners acknowledge that Eagle's obligation was only to bill the dealers on Carvel invoice forms, and not to make the collection thereof (See Contract, R. 127).

A second distortion appears in paragraph numbered "8" at page 47. Petitioners there state that the contract required Eagle to bill the dealers at prices *agreed upon* by

Carvel and Eagle. But at page 5, the Petitioners acknowledge that the prices to dealers were "determined by Carvel". The contract itself provides: "The invoices shall list the quantities of cones shipped and the following prices which Carvel charges to the Carvel dealers" (R. 127). The gravity of this distortion is appreciated when we observe that the plaintiffs attempted at the trial to utilize such false allegation that Eagle billed the dealers at prices "agreed upon" by Carvel and Eagle, as evidence of price-fixing. Judge Dawson summarily rejected such contention (R. 111).

The Petitioners have set before the Court five provisions of the Carvel-Eagle contract which they contend obligated Eagle to refrain from dealing with the plaintiffs (Pet. Brief, p. 47). Clearly, the provisions of the contract do not so restrict Eagle. In presenting said argument before Judge Dawson, the plaintiffs pointed specifically to Paragraphs 1 and 4 of the Agreement, namely, that Eagle would sell to Carvel all of Carvel's requirements of cones, and would produce cones of special design for Carvel and for no other person. Judge Dawson failed to find any violation of the anti-trust laws in such provisions (R. 110).

Thereupon, the plaintiffs abandoned the argument that a special design of cone was required by the contract, and endeavored to show instead that the cone with the swirl did not have the name of Carvel printed thereon, but bore the name "Major". Moreover, the Buddy Twinkle called for by the contract was soon discontinued; and the parties substituted therefor the "No. 40 cake cup cone", a standard Eagle product which it sells to the trade generally (R. 110-111, Pet. Brief, pp. 49-50).

Petitioners' argument in connection with the design of the cone is one of the most curious in their entire tortured presentation. First, it is apparent that they say nothing about the quality of Eagle's cone or about Eagle's ability

to produce and deliver expeditiously the quantities required in a highly competitive industry. They contend only that the design is not one peculiarly associated with Carvel, thereby raising a doubt as to Carvel's claim of uniqueness (Pet. Brief, p. 50). The Brief fails to disclose an important fact which was revealed to Judge Dawson, namely, that the plaintiffs discontinued their action as against Burry Biscuit Company, another supplier defendant, for the reason that the Burry product actually had the Carvel name stamped on its product and thus came within the Carvel trademark (R. 110).

Such argument is utterly specious and throws grave doubt upon the bona fides of the petitioners' claims. The argument appears to be that Eagle would not be in violation if only its cone had Carvel's name stamped on it. Petitioners' argument as to lack of uniqueness in the design of the Eagle cone becomes more incredible when considered in light of the decision in *U. S.* v. *Bausch & Lomb Optical Co.*, 45 F. S. 387, aff'd 321 U. S. 707. There the distributor was Soft-Lite Lens Co., Inc. which distributed pink lenses to licensed wholesalers. The function of Bausch & Lomb was similar to that of Eagle in the instant case; Bausch & Lomb manufactured the pink glass and ground the lenses which it sold exclusively to Soft-Lite. Unlike the instant case, Bausch & Lomb specifically agreed not to compete with Soft-Lite in the distribution of pink tinted lenses. The Court held that such contract effected a reasonable restraint upon competition. The Court stated (45 F. Supp. at page 399):

> "Nothing in the evidence indicates that Bausch & Lomb enjoyed a monopoly in the manufacture of glass for lenses, whether pink or otherwise. On the contrary, the evidence is clear that other manufacturers of lenses have had access to pink glass from other sources. . . ."

In *Bausch & Lomb*, the Government stressed the fact that the manufacturer who supplied the distributor (Soft-Lite) participated in an unlawful distribution system because it refused to sell pink lenses to any other customer. In the instant case, the plaintiffs claim a violation for precisely the opposite reason, namely that Eagle sold similar or equivalent cones to customers other than Carvel. Burry Biscuit, on the other hand, who made a product uniquely stamped "Carvel", which of necessity it could not sell to any other customer, was dropped as a party defendant because in the plaintiffs' eyes, the name Carvel printed on the product made Burry's arrangement with Carvel perfectly legal. The Court should give little consideration to this type of disingenuous argument.

In their argument before Judge Dawson, the plaintiffs virtually admitted that the Carvel-Eagle contract, standing by itself, contained no provision which restricted Eagle from selling direct to the dealers (R. 108). They then attempted to bring into the record certain testimony given by Mr. Vettel in a deposition taken in a case in which Eagle was not even a party (R. 108). The trial judge had specifically ruled that such testimony was not binding on the supplier-defendants (R. 106). Such improper reference to the testimony of Vettel has now been indulged in before this Court (Pet. Brief, p. 50). We are confident that the Court will disregard testimony which the trial court ruled inadmissible.

The petitioners' final effort to implicate Eagle as part of a conspiracy to refrain from selling direct to the Carvel dealers was its argument that the Court must *infer* knowledge on Eagle's part of the restrictive provisions of the franchise agreement (Pet. Brief, pp. 47-49; R. 108-109; 111-112). Judge Dawson was unable to find anything in the Carvel-Eagle contract which forced Eagle to comply with

the provisions of the franchise agreement (R. 111-112). The colloquy reads as follows (R. 108-109):

> "The Court: Where is there any statement that they won't sell those to a franchise operator?
>
> Mr. Yarnell: An agreement between Eagle Cone and Carvel contemplates the fact that the Carvel operators are under agreement with Carvel whereby they will not purchase or be permitted to purchase any cones other than those which are approved by Carvel and to Carvel specifications.
>
> The Court: Where does Eagle Cone agree to comply with any such thing?"

The trial court declined to draw an inference that Eagle entered into the contract with Carvel with full knowledge of, and in contemplation of Carvel's franchise agreements. Judge Dawson stated (R. 112):

> "The Court: I can't draw that inference unless there is proof. There is no proof. There is proof that Eagle Cone manufactures cones; that Carvel went to them and said, 'We will give you a design. You make the cones for us and we'll buy them at this price and you supply them to our stores.' That is the extent of the evidence in the case as far as Eagle Cone is concerned."

**The Proper Inferences To Be Drawn From Martin Cain's Affidavit:**

In a further attempt to prove knowledge by Eagle of the restrictive provisions of the Carvel franchise agreement, the plaintiffs referred Judge Dawson to the affidavit filed by Eagle's Sales Manager, Martin Cain. Judge Dawson then stated (R. 112):

> "I can't see anything in these paragraphs that shows any liability on Eagle Cone for what Carvel may have done with its franchised dealers."

Martin Cain's affidavit (R. 113-124) was prepared to show, *inter alia,* that the Carvel-Eagle contract was actuated by legitimate business motives and had a reasonable economic basis. In said affidavit Eagle presented facts which answered the question of whether its requirements contract with Carvel "springs from business requirements or purpose to monopolize" (*U. S.* v. *Columbia Steel,* 334 U. S. 495, 527). As stated in *Bascom Launder Corp.* v. *Telecoin Corp.,* 204 F. 2d 331, 335 (2nd Cir.), Cert. Den. 345 U. S. 994 (1953):

> "The plaintiffs could win only if they proved (1) that Bendix (the manufacturer) had a monopoly in fact of the product it sold to Telecoin (the distributor) and/or (2) the exclusive arrangement, as carried out, was without a reasonable economic basis and merely served as an instrument for unduly restraining trade."

In *Dennison Mattress Factory* v. *Spring-Air Co.* (5th Cir.) 308 F. 2d 403, 408, the Court said:

> "However, the cases seem to follow the principle that if the primary purpose of the contract is lawful, e.g., to protect one in the fruits of his labor, and if the arrangement was actuated by or could be explained on the basis of legitimate business justification as opposed to the desire to increase market control through economic leverage, then the court will generally hold any incidental restraint of trade, not harmful to competition or to the public, to be lawful. Dehydrating Process Co. *v.* Smith, (1 Circ.) 292 F. 2d 653."

The petitioners have gone through Mr. Cain's affidavit in an effort to show knowledge by Eagle of the restrictive provisions of the franchise agreement. (Pet. Brief, pp. 48, 50). We are confident that this Court will agree with

Judge Dawson that Mr. Cain's statements do not impute to Eagle any responsibility for what Carvel may have done with its franchised dealers.

Mr. Cain stated (par. 13, R. 116) that "The contract was negotiated by your deponent and Carvel officials in some five separate sessions over a substantial period of time." From such statement, the petitioners would have this Court speculate that Eagle must have then learned the restrictive provisions of the franchise (Pet. Brief, p. 48). But Mr. Cain stated in the self-same paragraph (R. 116-117):

> "I specifically deny that there were any understandings extrinsic to the contract relating to any restraint allegedly imposed on Carvel dealers such as preventing them from obtaining their cone supplies elsewhere, to deal directly with Eagle, to compel them to obtain their cones through Carvel, or to create artificial price levels at which they bought their cones. In short, Eagle had nothing to do with the dealers except to deliver cones to them per its agreement with Carvel."

In paragraph 9 of his affidavit (R. 115), Mr. Cain summarized the economic advantages accruing to both parties through the Carvel-Eagle contract as follows:

> (a) Carvel purchases from a supplier who has the productive capacity to supply its stores during periods of peak demand.
>
> (b) In the event of a labor dispute or act of God, Eagle could resort to its affiliated cone manufacturers in the East to make the special Carvel cones.
>
> (c) Eagle could supply all the Carvel locations with its own fleet of trucks.
>
> (d) Carvel knew that it would be obtaining cones made of high quality ingredients to assure public acceptance of their taste and flavor.

(e) The contract assured Eagle of a stable market in a fiercely competitive industry where orders are given on "as needed" basis.

(f) The Carvel-Eagle requirement contract is unique in the industry and very few of Eagle's 15 major competitors serving the tri-state area have them.

(g) Eagle could anticipate Carvel's requirements so as to have in stock adequate supplies of finished goods and raw materials to assure continued supply of cones to Carvel operators during periods of peak demand.

(h) Eagle's selling expenses were reduced.

Petitioners have focused their attention on Items (e) and (f) above (Pet. Brief, p. 48) and have inferred therefrom not only a complete awareness by Eagle of the restrictive provisions of the Carvel franchise but also "an admission of an express intent to join with Carvel in suppressing competition." (Pet. Brief, p. 49). They ask this Court to conclude, in the language of the *Bascom Launder* case (204 F. 2d, at page 335): "that the exclusive arrangement, as carried out, was without a reasonable economic basis and merely served as an instrument for unduly restraining trade".

In respect of Item (b) above, the petitioners have twisted Mr. Cain's statement that Eagle could resort to affiliated cone manufacturers who could make the *special Carvel cone,* to mean that the Eagle product could be produced without difficulty by any other supplier (Pet. Brief, p. 50). Mr. Cain was talking about "affiliated cone manufacturers"; he was not referring to the 15 competitive suppliers.

In paragraph 16 of his affidavit (R. 117-118), Mr. Cain listed 15 competitors of Eagle. In paragraph 22 (R. 120-121) he listed the number of cone machines operated by

each, showing that Eagle operates 9 machines of a total of 102; and that the three larger competitors operate 60 machines. The only inference that petitioners draw from such data is that the Carvel-Eagle contracts excluded Eagle's competitors from the market consisting of Carvel Stores (Pet. Brief, p. 50).

The inferences which the Court should properly draw from this data showing Eagle's relative position in the industry are that Eagle had no monopoly in fact of the product it sold to Carvel and that the Carvel-Eagle contract did not give it such monopoly. As stated in *Packard Motor Car Co.* v. *Webster Motor Car Co.*, (D. C. Circ.) 243 F. 2d 418, Cert. Den., 355 U. S. 822 (at page 420):

> "When an exclusive dealership is not part and parcel of a scheme to monopolize and effective competition exists at both the seller and the buyer levels, the arrangement has invariably been upheld as a reasonable restraint of trade.. In short, the rule was virtually one of per se legality."

And at page 421:

> "The short of it is that a relatively small manufacturer, competing with large manufacturers, thought it advantageous to retain its largest dealer in Baltimore, and could not do so without agreeing to drop its other Baltimore dealers. To penalize the small manufacturer for competing in this way not only fails to promote the policy of the antitrust laws but defeats it."

In the recent case of *Crawford Transport Company* v. *Chrysler Corporation* (6th Circ.) 338 F. 2d 934, Chrysler required its franchise dealers to utilize the transportation services of carriers which it retained to transport its new vehicles to the dealer. In the instant case, petitioners

contend that the Carvel-Eagle contract excluded competing cone manufacturers from the market consisting of Carvel stores (Pet. Brief, p. 60). In the *Chrysler* case it was similarly contended that Chrysler and the retained carriers entered into a conspiracy to eliminate competition; and to allocate to retention carriers, free from the competition of non-retention carriers, specified territories and percentages of business. The Court held that there was no evidence of any contract, combination or conspiracy in restraint of trade "or any attempt on the part of Chrysler, alone, to monopolize the business of transportation of new motor vehicles, or by combination with Commercial, Motors, or any of the other retention carriers to monopolize such business."

## POINT III.

**The Carvel-Eagle contract satisfied the test of reasonableness which this Court has imposed upon requirements contracts.**

Once we eliminate from the case the unproved conspiracy, the Eagle-Carvel contract may be judged as a simple requirements contract. An analysis of its "economic ramifications" in the ice cream cone industry, or indeed even in the ice cream industry, will satisfy the test of reasonableness imposed by the decisions. The only inference which the evidence can sustain is that the effect of said contract in the relevant market area was infinitesimal.

Judge Dawson held (R. 52):

> "There is no allegation in the complaint that the provisions under which the dairies agreed to furnish all of Carvel's requirements for Carvel Mix were

> illegal in themselves, and the plaintiffs failed to prove that such provisions were in fact illegal. See, Tampa Electric Co. *v.* Nashville Coal Co., 365 U. S. 320 (1960); United States *v.* Columbia Steel, 334 U. S. 495 (1948)."
>
> * * * * * *
>
> "The same conclusion applies to the contracts of the two other supplier defendants, Eagle Cone Corporation and Mohawk Container Co. . . . These contracts were not shown to be in any way illegal, still less illegal *per se.* See Bascom Launder Corp. *v.* Telecoin Corp., 204 F. 2d 331 (2d Circ.), Cert. Denied, 345 U. S. 994 (1953)."

In an article by Stanley D. Robinson entitled "Restraints On Trade And The Orderly Marketing of Goods" (45 *Cornell Law Quarterly* 254, (1960); 2 *Hoffman's Antitrust Law and Techniques* 81), the author states:

> "Since Bausch & Lomb, exclusive selling has rarely come under governmental fire. In a later case, which involved an international cartel, the Department of Justice was unsuccessful in its attempt to enjoin one of the defendants from continuing exclusive distributing arrangements which had not been employed in furtherance of the conspiracy (United States *v.* Imperial Chemical Industries, Ltd., 105 F. S. 215, 244-45 (S. D. N. Y. 1952)). But by and large the attacks have come from private parties seeking treble damages. And, as we have seen, their efforts to induce the courts to depart from traditional doctrine have met with single failure. This is an area, then, where it can be said with some certainty that the antitrust laws do not stand in the way of a normal and reasonable restriction on competition. The rule of reason operates here in full sway."

In spite of the plaintiffs' failure to offer any proof as to the influence of the Carvel-Eagle contract upon the market, the record does contain a detailed analysis thereof made by Martin Cain (See Affidavit, R. 117-123).

Said affidavit showed that Eagle had 15 major competitors who supply customers in the tri-state area of New York, Connecticut and Massachusetts on the same basis as does Eagle (R. 117-118). Sales by all manufacturers in the tri-state area averaged 1,250,000,000 cones per year, Eagle sold Carvel 15,000,000 cones per year, or 7/10ths of 1% of the total sold by all manufacturers (R. 119). The dollar volume of sales by all manufacturers averaged $11,000,000 per year. The volume of sales by Eagle to Carvel was $115,000, or 1% of the total sold by all manufacturers (R. 119). The total volume of all Eagle sales in the area, including sales to Carvel, amounts to $500,000 or 5% of the total sold by all manufacturers (R. 123).

All manufacturers in the area operate a total of 106 to 110 ice cream cone machines; Eagle operates 9 of said machines (R. 120); 25 machines are operated by National Biscuit Company, which sell to 20% of the market; and 25 machines are operated by S & S Cones which also sells to 20% of the market. More than one-half of the total number of machines are operated by three companies other than Eagle (R. 120, 123).

In the area, there are 125,000 ice cream outlets where ice cream in cones may be purchased by the consuming public. Eagle delivers to 250 Carvel dealers, or to 1/5th of 1% of the total number of outlets. Among said outlets are "Dairy Queen", "Tastee Freez", "Dari-Delite", "King Kone", "Dari Isle" and other smaller chains, as well as thousands of independents. Also included are manufacturer-retailers like Woolworth; companies like "Good

Humor" and "Bungalow Bar", as well as independents, who operate trucks and carts; and the hard ice cream chain like Howard Johnson and Friendly Ice Cream Co. (R. 122).

The proof of the relevant market applicable to the sale of ice cream cones in the tri-state area consisted exclusively of the facts set forth in the Cain affidavit. The plaintiffs offered no proof to contradict a single fact recited therein. Indeed they offered Cain's affidavit as their own exhibit (R. 113). The conclusion is inescapable that no substantial competition was foreclosed in such market, particularly when the scope of Eagle's operations are considered in comparison with the much larger restraint in trade evidenced in the *Columbia Steel* case and the *Tampa Electric Co.* case, two instances where the Supreme Court upheld the validity of requirements contracts. It should also be noted that the duration of the requirements contract in the *Tampa Electric Co.* case was for 20 years, while in the case at bar, the term was for one year with automatic renewal, and with the privilege to terminate available to either party on 90 days' notice. The Courts have uniformly held that a one-year term for a requirement contract is reasonable (*F. T. C.* v. *Motion Picture Advertising Service*, 73 S. Ct. 361; *U. S.* v. *American Can Co.*, (D. C. Calif.), 87 F. Supp. 18, 31; *U. S.* v. *American Linde Air Products Co.*, (N. D. Ill.) 83 F. Supp. 978, 982).

The Court of Appeals considered the foregoing evidence and noted in its majority opinion that Carvel's purchases from Eagle amounted to only about 1% of the total sales of cones in the tri-state area (R. 451). Such figures satisfied the majority of the Court as to the "insubstantiality" of the commerce affected. Moreover (R. 451-452):

> "Not only was the amount of commerce in these not consequential, but any damage to the plaintiffs was

even less so. Eagle Cone's billings to Carvel averaged $460. per dealer per year, and Carvel's mark-up was slightly over 5% or about $25. per dealer; whether the dealers suffered even that much damage is questionable since the price Carvel charged them was less than they could have obtained, if they bought in smaller quantities than Carvel, see fn. 7 to Chief Judge Lumbard's opinion."

## Conclusion.

It is respectfully submitted that the judgment dismissing the complaint as against Eagle Cone Corporation should be affirmed.

Respectfully submitted,

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